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No. 01-0026

Supreme Court, U.S.
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In the

Supreme Court of the United States

DAVID SMITH,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether certiorari must not be granted where petitioner raises no new issue and where this Court has previously held that prosecutorial discretion to seek the death penalty does not violate the eighth and fourteenth amendments.

Whether certiorari need not be granted where the trial judge heard the evidence presented at petitioner's trial, both his sentencing hearings and his post-conviction hearing and stated that he was "quite familiar" with the issues of the post-conviction petition; whether petitioner's contention that clear standards are lacking is simply unfounded; whether the Illinois Supreme Court properly determined that no timeliness issue existed and whether the trial court properly dismissed petitioner's petition without an evidentiary hearing.

Whether certiorari need not be granted where the Illinois Supreme Court properly dismissed petitioner's claim of ineffective assistance of counsel under *Strickland v. Washington*.

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PRAYER

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari to the Illinois Supreme Court be denied.

OPINIONS BELOW

On October 15, 1992, the Illinois Supreme Court affirmed petitioner's convictions but vacated his death sentence and remanded the cause for a new sentencing hearing based on the trial court's failure to "life-qualify" or "reverse-*Witherspoon*" the jury. *People v. Smith*, 152 Ill. 2d 229, 274, 604 N.E.2d 858 (1992) *(Smith, I)*. On February 9, 1994, petitioner waived his right to a jury for sentencing. (RS 46-7) On remand, the trial court reimposed the death penalty for petitioner's murder conviction and on March 20, 1997, the court affirmed petitioner's sentence of death. *People v. Smith*, 176 Ill. 2d 217, 680 N.E.2d 291 (1997) *(Smith, II)*. The Illinois Supreme Court thereafter affirmed the trial court's denial of petitioner's post-conviction petition in *People v. Smith,* 195 Ill. 2d 179, 745 N.E.2d 1194 (2000). (*Smith, III*).

JURISDICTION

Petitioner seeks discretionary review by means of certiorari under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Amendment XIV

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

Procedural History

At the close of the evidence at petitioner's trial, a jury found petitioner guilty of first degree murder, aggravated criminal sexual assault and home invasion. On January 12, 1989, the jury found petitioner death eligible, found no mitigating factors sufficient to preclude the imposition of the death penalty and petitioner was sentenced to death. An automatic appeal to the Illinois

Supreme Court followed. On October 15, 1992, the Illinois Supreme Court affirmed petitioner's convictions but vacated his death sentence and remanded the cause for a new sentencing hearing based on the trial court's failure to "life-qualify" or "reverse-*Witherspoon*" the jury. (R. C197-226); *People v. Smith,* 152 Ill. 2d 229, 274, 604 N.E.2d 858 (1992).

The same judge, the Honorable Themis N. Karnezis presided over petitioner's second sentencing hearing. Petitioner signed a jury waiver, opting to have the judge determine his sentence. (R. 46-7) Petitioner was sentenced by the trial judge to death. (R. 464) The Illinois Supreme Court affirmed petitioner's death sentence. *People v. Smith*, 176 Ill. 2d. 217, 680 N.E.2d 291 (1997).

Petitioner filed his original petition for post-conviction relief on December 21, 1996 and his an amended petition on December 5, 1997. On September 11, 1998, the same judge who had presided over both of petitioner's sentencing hearings stated that he had reviewed all of the issues, that he was "quite familiar with them," and dismissed the post-conviction petition without an evidentiary hearing. The Illinois Supreme Court affirmed this dismissal of petitioner's petition in *People v. Smith,* 195 Ill. 2d 179, 745 N.E.2d 1194 (2000).

Facts Leading to Petitioner's Convictions and Sentence

On March 17, 1987, the victim, Lisa Ferguson, had been living with her aunt, Juanita Soto, at 3122 South Union in Chicago, for about one week. Also living at this address were Juanita's four-year old daughter, Sirena, Sirena's father, Carlos, and a friend, Edward Ramirez. (R. 83, 110)

On that date, Lisa agreed to babysit Sirena while Juanita met Carlos at a bar called Bucko's. (R. 87, 112) At Bucko's Bar, Juanita saw petitioner, who was a good friend of her husband's, Edward Ramirez and Ephraim Ramirez. Juanita had known petitioner for approximately ten years. Juanita arrived some time after 6 p.m. and had a brief conversation with petitioner, who was not slurring his words and did not appear intoxicated. (R. 87-8) Petitioner left the bar alone around 7:30 p.m. Shortly thereafter Edward and Ephraim left. Edward came back to the bar a bit after 8 p.m. and told Juanita and Carlos to go home because something bad had happened. (R. 89-90)

In the meantime, Lisa and Sirena were sitting on the sofa watching "The Wizard of Oz" and eating popcorn. (R. 112) Someone knocked on the door; when asked who was there, petitioner answered that he was "Dave." Petitioner had been to Sirena's house before and Sirena recognized petitioner's voice. Lisa told petitioner that she could not let him in and she returned to the couch with Sirena. (R. 115-6)

About an hour later, there was another knock at the door. The man behind the door said that he was Lisa's brother, Max, but when Lisa opened the door she saw that petitioner, and not Max, stood there. (R. 117-118) Sirena ran and hid underneath her bed. (R. 118) She heard Lisa screaming from the kitchen and then she heard petitioner say "shut-up." Sirena heard the silverware drawer open, heard the silverware rattling, and then there was silence. (R. 119) About five minutes later, while still under her bed, Sirena heard the bathroom water running.

At approximately 7:45 p.m., a next-door neighbor, Sharon Chandler, heard angry voices coming from Jua-

nita Soto's apartment. (R. 176) She heard a woman ask, "What do you want?" and a man scream, "Shut up, be quiet!" (R. 177) She heard scuffling noises as if furniture was being moved around. (R. 177) Ms. Chandler told them if they did not stop fighting that she would call the police. (R. 177) The man told her to shut up and then she once more heard the woman say "What do you want?" (R. 177) After the woman's ensuing scream abruptly stopped, Ms. Chandler called the police. (R. 177-78)

When Detectives McCann and Koclanis arrived at the crime scene about five minutes later, Lisa Ferguson was lying face-down on the kitchen floor with a large pool of blood by her head. (R. 193-194) A knife was alongside her head and her undergarments and jeans were pulled down and wrapped around one leg. Another knife was in the kitchen about ten feet away. A bowl of popcorn was knocked down from the kitchen table. The victim's body was smeared with blood and there were marks on the back of her legs and on her buttocks. A curling iron was lying between her legs in her buttocks area. (R. 194) A wire was on her leg. (R. 195)

A police officer took Sirena to a neighbor's house. (R. 120) When she saw her mother she said "mommy, mommy, Lisa died. Dave killed her." (R. 90, 121) The police asked Juanita if she knew anyone named "Dave." When she answered affirmatively, they asked her to show them where he lived. (R. 91) Officers Simon and Lukensmeyer, Lieutenant Vargas, Juanita Soto and Max Ferguson went to petitioner's apartment at 918 W. 31st Place. (R. 91, 181) Simon and Lukensmeyer walked through the gangway to the rear of the building and heard a man and woman arguing in the basement. (R. 183) The woman asked, "Where were you?" and the man responded that he was out. The man then said that he saw

someone killed that night and then he admitted, "I did it." (R. 184)

The police knocked at the door, announced their office and asked petitioner if he was David Smith. (R. 91, 185) He answered yes and was placed under arrest. (R. 185) Petitioner had changed his clothes since leaving the tavern. (R. 92)

Josephine Palomino, petitioner's girlfriend with whom he shared an apartment, allowed the police to look in the apartment. They found petitioner's blood-stained blue jeans and white thermal undershirt soaking in a wash basin. They then took petitioner to the police department. (R. 186)

Dr. Nancy Jones, an expert in forensic pathology, performed Lisa Ferguson's autopsy on March 18, 1987, and testified as to the extent of her injuries. At seventeen years old, Lisa weighed approximately 116 pounds and was five feet four and a half inches tall. Lisa suffered at least 29 blunt trauma injuries, three stab wounds, two incised wounds, and numerous bruises, abrasions, and hemorrhages to her head, face, neck, tongue, trachea, shoulder, chest, upper arms, knees, thighs, buttocks, and genitalia. (R. 62-65) The injuries to her neck region were the most significant. (R. 65) There were numerous abrasions and bruises around her eyes and pinpoint-like hemorrhages on her face. (R. 64) Lisa's abrasion on her upper chest, measuring five or six inches, appeared to be a brush or rug burn abrasion. (R. 65)

An area of redness at the very beginning of the vagina measured one-quarter of an inch. (R. 65) Lacerations and tears around the victim's rectal and anal area were consistent with forcible penetration with an object such as a curling iron. (R. 66, 70) The anus was loose and

gaping and some bloody fluid appeared just inside the anus. (R. 66)

The victim's burns were consistent with being dragged on the floor or on the carpet. (R. 79) Her facial abrasions were consistent with being struck with a fist or an object. (R. 80) Her sharp neck injuries were consistent with being either stabbed or slashed with a knife, and the cause of death was determined to be multiple stab wounds with strangulation a contributing factor. (R. 70-2)

Vaginal, oral and rectal swabs taken from the victim proved negative for the presence of spermatozoa and semen. (R. 220) Both the victim and petitioner shared the same blood, type A. (R. 222) The knives and petitioner's gym shoes contained blood, type A. (R. 223, 227)

Back at the police station, petitioner received *Miranda* warnings. Petitioner gave oral and written statements in which he admitted killing the victim. According to his statement, petitioner knew Lisa Ferguson for several years, but did not know that she was still in the neighborhood. He had been drinking before he went to the apartment at 3122 South Union with the purpose of burglarizing it. He wanted the VCR that he knew was inside. When Lisa answered the door, he decided not to go through with the burglary and told her that he was looking for BoBo. Lisa told him that BoBo was not there and petitioner left the apartment. He decided to return, intending to kill Lisa. When she opened the door, petitioner forced his way inside and grabbed her by the throat. He struggled with her near the bedroom entrance. The knife must have been on the kitchen counter when they were struggling in the kitchen. Petitioner stated "he was glad that she died because he didn't want

her to live remembering how bad he had beaten her." Petitioner first stated that he cut himself during the struggle, but corrected his statement with the assertion that he cut himself at work earlier in the day. (R. 196-99, 243-247) Interrogating officers noticed there was blood on petitioner's clothing and asked him to remove his pants. A large stain on petitioner's knee contained blood. (R. 200) Blood stained the inside of petitioner's underpants. (R. 201) Petitioner dressed and was placed in a lineup. Sirena viewed the lineup and identified petitioner. (R. 123, 202) Sirena told the police that it "was Dave who was there." (R. 130)

Twice, while petitioner was incarcerated, shanks were found in his cell. On June 15, 1988, at approximately 10:00 p.m., an officer recovered a shank with a rag wrapped around the handle from the air vent in petitioner's cell. (R. 171-2) Petitioner admitted that it was his. (R. 172)

On January 2, 1990, another officer found a six-inch long metal shank in a Folger's can during a routine shakedown of petitioner's cell. (R. 146) (R. 147-8) Petitioner was not present during the shakedown, but when he later saw the officer, he screamed that she was a "nosey bitch" and that he was "going to burn her, bitch." (R. 149) Petitioner subsequently received three months' segregation and was demoted to a "C" grade which included the loss of certain privileges. (R. 149-50)

On November 11, 1992, petitioner threw boiling water, smelling of urine, on Officer Upchurch's face, neck, shoulder and back. (R. 133-34, 136) Petitioner yelled at the officer to "stop walking around like a peacock" and that he was not as tough as he thought he was. (R. 134)

Officer Upchurch was later treated for his injuries at Pontiac Correctional Center Health Facility and then transported by ambulance to St. James Hospital in Pontiac. The left side of his face, ear, neck, shoulder and back were burned, requiring an overnight stay. (R. 135) Petitioner was charged with aggravated battery and a jury subsequently convicted him in November 1993. (R. 137-8)

Petitioner also threw boiling water at an inmate on May 14, 1992. On that day, the inmate yelled that his clothes were all wet. His arms were red and blisters were forming. It "looked like hot steam coming off some of his clothes too." (R. 159-60) The water originated from petitioner's cell. (R. 161) Petitioner boasted, "I got the last laugh." (R. 162) The inmate was hospitalized. (R. 162) Following a hearing on the assault of the inmate, petitioner received six months' segregation with his classification changed to "C." (R. 165)

Three witnesses testified in mitigation and the testimony of four witnesses from petitioner's first sentencing hearing were presented in mitigation by way of stipulation. One witness, Josephine Palomino, testified at both hearings. (R. 247)

Deputy sheriff and jail supervisor Timothy Martin recalled petitioner's good adjustment to institutionalized life in the county jail. Petitioner received free time out of his cell in exchange for his work duties. (Supp. R 202, 210) He also became a Christian and carried a Bible. (Supp. R. 205-6) Petitioner chose to associate with a group called the Neutrons rather than affiliate with a gang. (Supp. R. 207) Petitioner was polite, courteous and helpful. (Supp. R. 203)

Petitioner's brother, James Smith, provided a comprehensive account of petitioner's early life. Petitioner was one of eight children. (Supp. R. 246) His father was an alcoholic who did not spend a great deal of time with him. (Supp. R. 246-47, 258) After his parents separated, petitioner and his mother moved to Chicago where he saw his mother once a day for about an hour. (Supp. R. 250) Petitioner and James were sent to Arizona to live with their father and petitioner quarreled with his stepmother. (Supp. R. 253-4) At thirteen, petitioner began running away with his brother James, and the two boys stayed away from home for a couple of days at a time. (Supp. R. 256) By the time he entered high school, petitioner was using marijuana three times a week and stealing from department stores with his brother. (Supp. R. 257-8, 271-2)

James Smith described his own criminal background and admitted he had burglarized a Phoenix home and a surveillance trailer in Illinois. (Supp. R. 266-67) In this connection, he testified that he and petitioner "would steal most anything" from homes and stores when they lived together in Arizona. (Supp. R. 273)

Petitioner finally "got tired of it all" and left his father's home at fourteen. (Supp. R. 259) Petitioner stayed in Phoenix until he was arrested for shoplifting and placed in a halfway home for delinquents. (Supp. R. 259-60) At sixteen, petitioner moved to Oregon to live with another brother, but he later lived with his mother again in Chicago. (Supp. R. 259, 262) When James saw petitioner again in Chicago, petitioner's drug use included marijuana, LSD, angel dust, and uppers and downers. He also drank "pretty much." (Supp. R. 263-4)

Twenty-three year old Josephine Palomino, alternately described as petitioner's girlfriend and common-law

wife, met petitioner in 1985 and moved in with him six months later. (Supp. R. 280-81) At the time of the murder, she was living with petitioner for about ten months. (R. 250) Petitioner told her how he had lived on the streets and had used drugs heavily, including marijuana, cocaine, PCP, and heroin. (Supp. R. 282-83, 285, 288) Things went well for a while and the couple started saving money to get married (Supp. R. 287) but petitioner began spending less and less time at home. He finally admitted using drugs again. (Supp. R. 292)

Josephine became pregnant and as her pregnancy progressed, petitioner became more and more removed. (R. 252) They fought frequently and petitioner often came home intoxicated. (R. 253) Early in 1987, Josephine learned that petitioner owed money to drug dealers, and she borrowed $1000 to pay his debts. (Supp. R. 290-91)

At the time of the murder, Josephine was eight months pregnant. Her son was born in April of 1987, one month after Lisa Ferguson's murder. (Supp. R. 292, R. 252) Although Josephine only communicates with petitioner about their son, David, she feels that her son and petitioner have a very strong and necessary relationship. (R. 254) Josephine testified that petitioner has had a positive impact on her son as far as instilling in him the importance of school and family. (R. 255) She further testified that it would be devastating to her son if petitioner was put to death. (R. 256)

Josephine's mother, Rose, generally corroborated Josephine's account when she testified. Mrs. Palomino liked petitioner "instantly," and she was pleased when petitioner fixed the plumbing in her home and repaired a damp wall for her. "He was just a nice person." (Supp. R. 304-6)

Dr. Lawrence Heinrich, a clinical psychologist, interviewed petitioner once on September 3, 1993, six years after Lisa Ferguson's murder. (R. 274) He reviewed the police reports, the victim's post-mortem report, a social history report prepared by David Randall in 1989 and the public defender's appellate brief and spoke with Josephine and Rose Palomino. (R. 264) Dr. Heinrich administered a series of psychological tests on petitioner.

It was Dr. Heinrich's belief that petitioner had a borderline personality which is characterized by a lack of self-worth and excessive distrust. (R. 268) He felt that it was possible for this type of individual to have brief psychotic episodes under certain stressful conditions. (R. 269) He thought that petitioner fell within a psychological diagnostic category characterized by enormous difficulty in forming consistent interpersonal relationships, poor impulse control and substance abuse. (R. 270-273)

Dr. Heinrich admitted that the tests were very subjective and even the Million test, which is more objective, depends on petitioner. (R. 282) Dr. Heinrich believed that petitioner tended to exaggerate some of his symptoms. (R. 283) Petitioner never told the doctor about petitioner's drug use on the night he killed Lisa Ferguson. (R. 288) Dr. Heinrich felt that the scalding water and the shanks found in petitioner's prison cell were all attributed to living in an incarcerated setting. (R. 293-294) It was his opinion that petitioner was merely trying to protect himself. (R. 297)

Dr. George Savarese did a comprehensive psycho-social developmental history of petitioner. (R. 299) After a single interview with petitioner, he opined that petitioner had a borderline personality with some schizoid features. (R. 304)

Following closing arguments, the trial judge noted that this was an exceptionally brutal case. (R. 461) The court then held that there was insufficient mitigation, and that, after considering the facts of the case, petitioner's conduct subsequent to his arrest, and his convictions, the sentence of death was appropriate. (R. 464)

REASONS FOR DENYING THE WRIT

I.

CERTIORARI MUST NOT BE GRANTED WHERE PETITIONER RAISES NO NEW ISSUE; THIS COURT HAS PREVIOUSLY HELD THAT PROSECUTORIAL DISCRETION TO SEEK THE DEATH PENALTY DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner first alleges that certiorari must be granted to decide the question whether a death penalty statute lacks clear objective criteria where the prosecutor is vested with total discretion in requesting a capital sentencing hearing. (Pet. Br. 14-15) No "arbitrary and capricious application" exists however where the prosecutor's objective consideration of the particularized circumstances of the individual offense and the individual offender are embedded in the Illinois Death Penalty Statute.

The prosecutor's role under Section 9-1(d) of the Illinois Death Penalty Statute is limited to that of initiating the proceedings:

> Where requested by the State, the court shall conduct a separate sentencing proceeding to determine the existence of factors set forth in subsection (b) and to consider any aggravating or

> mitigating factors as indicated in subsection (c). [720 ILCS 5/9-1(d)].

Petitioner's argument, that the Illinois Death Penalty Statute provides for arbitrary and capricious application, has been rejected outright many times. For instance, in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950 (1976), this Court decided that a prosecutor's discretion to charge a capital offense and subsequently engage in plea bargaining did not result in the arbitrary imposition of the death penalty in violation of the Eight Amendment. Likewise, the Court in *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991), held that the Illinois Death Penalty Act does not violate the Eighth and Fourteenth Amendments even though the prosecutor has discretion to request a death penalty hearing. *Id.* at 993. The Court held that a prosecutor's decision under Section 9-1(d) of the Illinois statute to commence or forego a death sentence hearing is not a decision to "impose" the death sentence. Rather the prosecutor's role is limited to that of initiating the proceedings. *Id.*

Petitioner argues that because prosecutors are under no obligation to conform their approach to seeking death penalty sentencing hearings, whether to request such a hearing is dependent upon the "philosophy, policy or whim of the prosecutor in the county where a crime is committed." (Pet. Br. 15) The Court in *Silagy* took a contrary view:

> Indeed, rather than jeopardizing the integrity of the death sentencing procedure, we believe that the Illinois statute's grant of post-conviction discretion may enhance the quality of prosecutorial decisions in this regard in that it permits

> that prosecutor to weigh all of the evidence presented in the guilt/innocence stage of the proceedings in his assessment of the propriety of seeking the death penalty in that particular case. Thus, like the sentencing authority's ultimate decision to impose the death penalty, the prosecutor's preliminary decision to seek the death sentence in a particular case will be guided not only by the nature of the crime itself, but also by any individualized characteristics of the defendant which may come out during the course of the trial.

Moreover, simply because the Illinois Supreme Court adheres to long-established law governing the constitutionality of the statute does not mean that if, when presented with a viable argument, it would not review prior rulings. (*See* petitioner's cite to *People v. Smith,* 195 Ill. 2d 179, 208-9, 745 N.E.2d 1194 (2000), and claim that "the court has no intention of overruling its prior rulings on the constitutionality of this structure.") (Pet. Br. 15)

Petitioner acknowledges this Court's holding that a prosecutor's discretion in selecting cases to be prosecuted as capital cases is constitutional under the Eighth and Fourteenth Amendments. Petitioner contends nevertheless that the reasoning set forth in *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525 (2000) demonstrates that review on this question is merited. (Pet.'s Br. 17) Petitioner's premise, that "specific standards to ensure its equal application," are lacking in the Illinois Death Penalty Statute is faulty and has been rejected by this Court. (*Jurek v. Texas, supra.)*

This Court in *Bush* analyzed the "right to vote on equal terms" and held that the State may not, by later

arbitrary and disparate treatment, value one person's vote over another. *Bush*, 531 U.S. at 104-5. The specific question before this Court was whether the recount procedures adopted by the Florida Supreme Court are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate. *Id.* at 105. This Court found that Florida's basic command for the count of legally cast votes, that is, to "consider the intent of the voter," was "unobjectionable as an abstract proposition and a starting principle," but the problem lay in the absence of specific standards to ensure its equal application. *Id.*

Therein rests petitioner's misunderstanding both of *Bush* and established Illinois law in his analogy of this case to *Bush*. Petitioner's analogy might ring true if each and every one of the 102 counties in Illinois considered different factors in its determination of whether a defendant was death eligible. The prosecutors in Illinois, however, are limited to clear-cut, defined standards which ensure equal application.

To determine whether a defendant is death eligible, a prosecutor must first determine if a defendant, convicted of first degree murder, is over the age of 18. One of a series of aggravating factors must then apply. Every single prosecutor in the state of Illinois applies the identical standard in making a death eligible determination. *Bush* is therefore inapplicable to the instant case. Prosecutorial discretion to seek the death penalty does not violate the Fourteenth Amendment due process clause or the Eight Amendment prohibition against arbitrary sentences. *Albanese v. McGinnis*, 823 F. Supp. 521 (N.D. Ill. 1993), *cert. denied*, 115 S.Ct. 1114 (1995); *Williams v. Chrans*, 742 F. Supp. 472 (N.D. Ill. 1990), *cert. denied*, 505 U.S. 1208 (1992); *People v. Brisbon*, 129 Ill. 2d 200,

544 N.E.2d 297 (1989), *cert. denied,* 494 U.S. 1074 (1990); *People v. Stewart,* 105 Ill. 2d 22, 473 N.E.2d 840 (1984), *cert. denied,* 112 S.Ct. 162 (1984).

Petitioner finally alleges that this prosecutorial discretion is not subject to judicial review. (Pet. Br. 20) To the contrary, petitioner's own counsel raised the issue of whether his trial counsel was ineffective for failing to challenge the court's death eligibility finding. Simply because our supreme court disagreed with petitioner does not indicate that there was no review.

Petitioner has given this Court no novel reason upon which to grant a writ of certiorari. It has been decided many times that a prosecutor's discretion in initiating the capital sentencing hearings does not violate the Eighth and Fourteenth Amendments. Therefore, the People of the State of Illinois respectfully request that this Honorable Court deny petitioner's petition for certiorari.

II.

CERTIORARI NEED NOT BE GRANTED WHERE THE TRIAL JUDGE HEARD THE EVIDENCE PRESENTED AT PETITIONER'S TRIAL, BOTH HIS SENTENCING HEARINGS AND HIS POST-CONVICTION HEARING AND STATED THAT HE WAS "QUITE FAMILIAR" WITH THE ISSUES OF THE POST-CONVICTION PETITION; PETITIONER'S CONTENTION THAT CLEAR STANDARDS ARE LACKING IS SIMPLY UNFOUNDED; THE ILLINOIS SUPREME COURT PROPERLY DETERMINED THAT NO TIMELINESS ISSUE EXISTED AND THAT THE TRIAL COURT PROPERLY DISMISSED PETITIONER'S PETITION WITHOUT AN EVIDENTIARY HEARING.

Petitioner next contends that this Court should grant a writ of certiorari to establish clear standards for the

process due under post-conviction proceedings in which constitutional claims have been raised. (Pet. Br. 20) Petitioner bases this argument on his unfounded contention that the circuit court did not consider whether he established grounds for an evidentiary hearing before dismissing his petition without an evidentiary hearing. This contention is not supported by facts in the record and soundly fails where the Illinois circuit court and supreme court applied long-established state law in reviewing, and denying, petitioner's post-conviction petition. Standards for reviewing constitutional claims are clearly delineated in Illinois and petitioner's petition seeking a writ must be denied.

On appeal from a first-stage dismissal of a post-conviction petition, the Court's review is plenary. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998). "The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the [Post-Conviction Hearing] Act." *Id.* 183 Ill. 2d at 388. The statute of limitations applicable to the filing of petitioner's post-conviction petition was the statute that was in effect at the time he filed his petition. *People v. Bates*, 124 Ill. 2d 81, 85-86, 529 N.E.2d 227 (1988).

Petitioner argues that the circuit court never considered his post-conviction claims. He contends that the trial court did not consider whether he established grounds for an evidentiary hearing before dismissing his petition without an evidentiary hearing. (Pet. Br. 20) This argument was wholly discarded by the Illinois Supreme Court, and, upon a review of the record, unsupportable.

The judge who presided over petitioner's post-conviction hearing was no novice to petitioner's case. The Honorable Themis N. Karnezis presided over petitioner's trial, his original sentencing hearing, his second sentencing hearing and over the post-conviction hearing. Before dismissing petitioner's post-conviction hearing without an evidentiary hearing, the judge stated that he had "reviewed all the issues." In an understatement, he continued, "I am quite familiar with them." (R. C4) The court initially stated that the claims were either waived or *res judicata*, before adding that "furthermore" the claims from the guilt/innocence phase were improperly before it. Therefore, petitioner's allegation that the court "did not even consider whether petitioner established grounds before dismissing the post-conviction petition" is erroneous. (Pet. Br. 21) The Illinois Supreme Court applied a *de novo* review and affirmed the circuit court's dismissal of petitioner's petition.

In their brief before the Illinois Supreme Court, the People argued that the issue of timeliness was irrelevant where the circuit court did indeed review petitioner's claims. The Illinois Supreme Court properly determined that the issue of whether petitioner's petition was timely filed was a non-issue and proceeded to address petitioner's substantive issues. *People v. Smith,* 195 Ill. 2d 179, 187, 745 N.E.2d 1194 (2000).

The Illinois Supreme Court held that "in determining whether to grant an evidentiary hearing, all well-pled facts in the petition and any accompanying affidavits are taken as true." *Smith,* 195 Ill. 2d at 187. An evidentiary hearing is warranted only where the allegations of the post-conviction petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that the defendant's constitutional

rights have been violated." *Id.* Clear standards for the process due under post-conviction proceedings in which constitutional claims are raised are firmly rooted in Illinois law. No need exists for this Court to clarify that which was scrupulously applied in the instant case.

Petitioner's argument to this Court, that he was denied the trial court's full consideration of the post-conviction petition and the parties arguments in the first instance, as previously made, and rejected, by the Illinois Supreme Court. The circuit court considered and rejected petitioner's claims and therefore the issue of whether the petition was timely filed was irrelevant. A unanimous Illinois Supreme Court declined to address the timeliness issue; a unanimous Illinois Supreme Court reviewed the remaining issues raised by petitioner and held that the circuit court properly dismissed petitioner's post-conviction petition without an evidentiary hearing. Petitioner is simply rehashing a factual analysis not adopted by our state supreme court. The People of the State of Illinois respectfully request that this Honorable Court deny petitioner's petition for a writ of certiorari.

III.

(Response to petitioner's Arguments III and IV)

CERTIORARI NEED NOT BE GRANTED WHERE THE ILLINOIS SUPREME COURT PROPERLY DISMISSED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND v. WASHINGTON*.

Petitioner next alleges that this Court should grant certiorari to review the decision made by the Illinois Supreme Court that his counsel was effective during his

trial and his sentencing hearing. (Pet. Br. 24-30) This issue, dismissed by the Illinois Supreme Court after a careful review of the facts, under the standards set forth by this Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), is improper for certiorari review.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), this Honorable Court established the standard by which claims of ineffective assistance of counsel claims are to be measured. To be successful on such a claim, the defendant must show both that (1) counsel's performance was so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms and (2) that the deficient performance so prejudiced the defense as to deny the defendant a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064; *People v. Easley*, 148 Ill. 2d 281, 592 N.E.2d 1036, 1062-1063 (1992).

If the conclusion is reached that the defendant did not suffer prejudice as a consequence of counsel's actions, then there is no need to determine separately whether counsel's performance was in fact deficient. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. With respect to the prejudice component of the test, *Strickland* advises, "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

In his petition for writ of certiorari, petitioner makes the identical claims that he made before the Illinois Su-

preme Court. The supreme court reviewed petitioner's claims and found that he failed to establish ineffective assistance of counsel under either *Strickland* prong. Petitioner has offered no rational argument upon which this Court should grant certiorari.

Petitioner argued then and argues now that his counsel was ineffective in presenting his motion to suppress a statement that he gave at police headquarters on the night of March 17, 1987, in which he confessed to the murder of Lisa Ferguson. *People v. Smith,* 195 Ill. 2d 179, 189, 745 N.E.2d 1194 (2000). The Illinois Supreme Court held that since the testimony upon which petitioner relied was part of the record on direct appeal, it was waived. (*People v. Towns,* 182 Ill. 2d 491, 502-503, 696 N.E.2d 1128 (1998)). However, since the petitioner contended that his appellate counsel was ineffective for failing to raise the issue, the supreme court reviewed it.

Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *Smith,* 195 Ill. 2d at 190. "A defendant who contends that appellate counsel rendered ineffective assistance, e.g., by failing to argue an issue, must show that the failure to raise that issue was objectively unreasonable and that the decision prejudiced the defendant. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *Id.*

Petitioner argues that the testimony of Rose Palomino should have been introduced at the suppression hearing

to prove that petitioner had been yelling at the police station. (Pet. Br. at 25)

In denying this claim, the Illinois Supreme Court quoted the trial court in its holding that even assuming that "loud voices were raised," such evidence did not satisfy petitioner's burden of proof to show that his statement was not freely given. *Id.* The Illinois Supreme Court likewise examined petitioner's claim that he could not have knowingly and intelligently waived his *Miranda* rights due to his alleged PCP intake and held that petitioner received effective assistance of counsel. *Smith,* at 192.

The Illinois Supreme Court reviewed, and rejected, petitioner's claim that his trial counsel was ineffective for failing to suppress his statement, "I did it," overheard by the police. *Id.* at 194-195. The court held:

> In light of the fact that this was not a closely balanced case, we conclude that there is no reasonable probability that the outcome of defendant's trial could have been different had the challenged statement never been admitted. Therefore, we find that defendant suffered no prejudice as a result of the claimed error. [*Id.*]

Petitioner makes the *identical* argument here. Petitioner is asking this Court to reevaluate the facts and reexamine the finding of the Illinois Supreme Court. This is not an argument fit for this Court. *See, Watts v. Indiana,* 338 U.S. 49, 50, 69 S.Ct. 1347 (1949) (On review here of state convictions, all those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court.)

Petitioner also contended to the Illinois Supreme Court, and contends to this Court, that his counsel failed to present certain mitigating evidence that he was under the influence of PCP at the time of the murder and aggravating criminal sexual assault. (Pet. Br. 27) In support of this contention, petitioner attached three affidavits from friends who were celebrating with him the night of the crimes. Petitioner claims that these "occurrence witnesses" could have testified about petitioner's PCP use. (Pet. Br. 28) The Illinois Supreme Court held that not one of these affidavits mitigated petitioner's conduct, nor suggested any constitutional violation. The court held:

> There was simply not enough evidence to support a defense of voluntary intoxication. Any evidence with regard to defendant's intoxication is speculative and inconclusive. In fact, the majority of the evidence tends to show that defendant was not intoxicated when he committed the murder. [*Smith,* 195 Ill. 2d at 197.]

Regarding the use of these friends' testimony at the sentencing hearing, the Illinois Supreme Court likewise discarded this claim, holding that "even if the judge had heard the additional evidence from defendant's friends, there is no reasonable probability that the result of defendant's sentencing would have been different." *Smith,* at 203. Petitioner asks this Court to overrule a factual analysis previously made by our state court. He has not, accordingly, presented this Court with any reason upon which to grant certiorari. *Watts v. Indiana,* 388 U.S. at 50.

Petitioner also claims that his counsel was ineffective for failing to demonstrate his "extreme emotional and

mental disturbance" through drug abuse evidence. (Pet. Br. 27-28) To this contention, the Illinois Supreme Court held that the testimony petitioner claims is lacking would have been cumulative and therefore there was no reasonable probability that the result of petitioner's sentencing hearing would have differed. *Smith*, 195 Ill. 2d at 203. Petitioner failed to show prejudice under *Strickland.*

Petitioner also claims that his counsel was ineffective for failing to present a "complete picture of tumultuous and abusive upbringing." (Pet. Br. 29) When considering this identical issue, the Illinois Supreme Court held, "We disagree with defendant's contention that his trial counsel failed to present complete picture of defendant's upbringing." *Smith*, at 204. Because of this "disagreement" between petitioner and the supreme court, petitioner argues to this Court that the supreme court misapplied the *Strickland* standard. (Pet. Br. 30) The Illinois Supreme Court properly applied the *Strickland* standard and held that defendant failed to meet it. Reevaluating the facts is not the rationale for granting certiorari. *Chrisman v. Miller,* 197 U.S. 313, 25 S.Ct. 468, 469 (1905) ("In cases coming from a state court, we do not review questions of fact, but accept the conclusions of the state tribunals as final.")

Petitioner also contends that his constitutional rights were violated when his appointed counsel failed to rebut aggravating evidence of his conduct while incarcerated at Pontiac Correctional Center. (Pet. Br. 30) Petitioner argues that correctional officers who were familiar with him would have testified as to his "peaceable and law-abiding conduct and nature" while incarcerated. The Illinois Supreme Court held that this proffered evidence was cumulative, would not have altered the outcome,

and therefore his counsel was not ineffective for failing to present this evidence. *Smith* at 207.

Further, the Illinois Supreme Court looked to evidence presented in aggravation, including the horrid recounting of the crimes, so brutal that petitioner was "glad" that Lisa had died because he "didn't want her to live remembering how bad he had beaten her." *Smith,* 195 Ill. 2d at 208. The court recounted that the victim suffered at least 29 blunt trauma injuries, three stab wounds, two incised wounds, and numerous bruises, abrasions, and hemorrhages, and anal injuries consistent with forcible penetration. *Id.*

The supreme court noted that the trial court had called this case an "exceptionally brutal case," and related that it could not remember a case where the facts were more aggravating. *Id.* The supreme court held that petitioner failed to make a substantial showing that his constitutional rights were violated. *Id.*

To find counsel ineffective, petitioner must show resulting prejudice. The Illinois Supreme Court properly rejected petitioner's arguments of ineffective assistance of counsel under *Strickland*. There is no need for this Court to grant certiorari merely to rehash the facts. Petitioner's challenges are unworthy of certiorari review. Therefore, the People of the State of Illinois respectfully request that this Honorable Court deny petitioner's writ of certiorari.

CONCLUSION

Respondent, the State of Illinois, respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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